ORIGINAL

RECEIVED
AUG 29 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Supreme Court, U.S.
FILED
AUG 29 1983
ALEXANDER L. STEVAS
CLERK

NO. 83-536

ANTONIO JAMES,

Petitioner

Versus

STATE OF LOUISIANA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

WILLIAM J. GUSTE,
ATTORNEY GENERAL OF LOUISIANA

HARRY F. CONNICK,
DISTRICT ATTORNEY
OF ORLEANS PARISH

WILLIAM R. CAMPBELL, JR.,
ASSISTANT DISTRICT ATTORNEY
OF ORLEANS PARISH

BERYL M. McSMITH,
ASSISTANT DISTRICT ATTORNEY
OF ORLEANS PARISH

619 South White Street
New Orleans, Louisiana 70119
Tele: 822-2414, Ext. 604

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

ANTONIO JAMES,

Petitioner

Versus

STATE OF LOUISIANA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

STATEMENT OF THE CASE

The State's evidence produced at trial shows that on January 1, 1979, Antonio James approached seventy year old Henry Silver, placed a gun to Silver's head and demanded his money. When Mr. Silver shouted for help Antonio James shot him in the head below the right ear. James then rifled through Silver's pockets and removed a wallet containing $35.00. Mr. Silver died a few hours later after being taken to a local hospital.

Antonio James was arrested on January 26, 1979, after having attempted another armed robbery during which he was shot with his own gun. In December of 1981, a jury found him guilty of first degree murder and subsequently unanimously recommended that James be sentenced to death. On April 4, 1983, the Louisiana Supreme Court affirmed the sentence and conviction

of Antonio James. In its statutorily mandated review of this capital case the Louisiana Supreme Court found that the sentence was proportionate, not constitutionally excessive, nor influenced by passion, prejudice or any other arbitrary factors. State of Louisiana v. Antonio James, 431 So.2d 399 (1983).

ARGUMENT

Issue Number 1

Whether a sentence of death is unconstitutionally arbitrary when the record does not support each of the aggravating circumstances found by the jury.

The Louisiana Code of Criminal Procedure States:

> "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances." (Art. 905.3).

In the instant case the jury found the existence of two aggravating circumstances: 1) the defendant was engaged in the perpetration of an armed robbery at the time of the murder. La.C.Cr.P.art. 905.4(a); and 2) the defendant had been previously convicted of an unrelated murder and had a significant prior history of criminal activity. La.C.Cr.P.art. 905.4(c).

Petitioner does not contest the valid determination of the first aggravating circumstance, i.e., that the murder

was committed during the perpetration of an armed robbery, but rather he attacks the second aggravating circumstance on the grounds that the wording of the statute is unconstitutionally vague and that the specified aggravating circumstance is based in part upon an armed robbery and murder which occurred subsequent to the crime for which the petitioner was standing trial.

The Louisiana Supreme Court has taken the position that where more than one statutory aggravating circumstance is found by the jury, the failure of one aggravating circumstance does not invalidate any other aggravating circumstance found, nor would it invalidate the death sentence. State v. Sonnier, 402 So.2d 650 (La.1981); State v.Monroe, 397 So.2d 1258 (La.1981).

Because the Louisiana Supreme Court found the first aggravating circumstance to be fully supported by the evidence and unchallenged by the defendant, it did not find it necessary to consider the merit of petitioner's challenge to the validity or constitutionality of the second circumstance. Nevertheless, the Court referred to its decision in State v. Monroe, supra, in which it rejected the Fifth Circuit holding in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), and held that where two of the three aggravating circumstances found by the jury were upheld on appeal, the death penalty need not be reversed.

In Stephens, the defendant was convicted of murder and sentenced to death. After his conviction and sentence were affirmed on appeal to the Supreme Court of Georgia, he sought federal habeas corpus relief. The United States District Court for the Middle District of Georgia denied him relief, prompting his appeal to the United States Court of Appeals for the Fifth Circuit.

Among the aggravating circumstances found by the jury in returning the death penalty was "the offense was committed by one having a substantial history of serious assaultive criminal convictions." Subsequent to petitioner's conviction, that aggravating circumstance was ruled to be unconstitutionally vague. Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976).

Relying upon a series of cases commencing with Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 85 L.Ed. 1117 (1931), the Fifth Circuit held that because it was impossible to determine whether or not the jury relied upon the unconstitutional aggravating circumstance in returning the death penalty, the penalty could not stand. In Stromberg, a young woman was convicted under a statute, parts of which were patently offensive under the First Amendment. Although one of the alternative theories of guilt under that statute was constitutional, this Honorable Court found that because the judge returned a general verdict which did not indicate which theory of guilt he relied upon the conviction could not stand.

Similarly, the Fifth Circuit found that because it could not determine the extent to which the jury relied upon the unconstitutional aggravating circumstance, the penalty could not stand.

The Louisiana Supreme Court, torn between the conflicting opinions of the highest court of the State of Georgia and an intermediate federal court, chose to adopt as persuasive the opinion of the Georgia Supreme Court.

This conflict has been resolved by this Honorable Court in its reversal of the Fifth Circuit in Zant v. Stephens, ____ U.S. ____, 103 S.Ct. 2733 (1983), wherein it was held that subsequent invalidation of one of several statutory aggravating circumstances does not automatically require the reversal of the death penalty.

In the instant case, the questioned aggravating circumstance, although found by the jury, was not the basis for appellate approval of the sentence. Since Louisiana law requires that only one aggravating circumstance be found in order to justify the imposition of the death penalty, only one circumstance was reviewed. Since the requisite one aggravating circumstance of murder in the course of an armed robbery was clearly present and was unanimously found by the jury, the challenged circumstance is material only in deciding whether the aggravating and mitigating circumstances weighed together indicate that the death penalty should be imposed. As in Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982), the jury necessarily focused on what the defendant had done, not on how Louisiana classified his actions. The lack of precise definitions relative to the second circumstance affected none of petitioner's substantial rights.

The aggravating circumstance upon which the Louisiana Supreme Court based its review is not facially unconstitutional, nor did the circumstance unreviewed by the Court serve as the basis for the death sentence. Irregardless of the number of aggravating circumstances returned by the jury, the implication is clear that, in the absence of facial unconstitutionality, one valid circumstance may properly serve as the basis for appel-

late affirmation of the death sentence. Williams v. Maggio, supra.

In the instant case, however, the Louisiana Supreme Court did not reject the second aggravating circumstance or rule on its constitutionality since the existence of the first circumstance was clearly substantiated. Respondent avers that under standards enunciated in Zant v. Stephens, supra, Williams v. Maggio, supra, and the established jurisprudence of the State of Louisiana, it is unnecessary for this Honorable Court to review the correctness of the jury's determination of the existence of the second aggravating circumstance or the constitutionality of the statute upon which the determination was based. State v. Mattheson, 407 So.2d 1150 (1982); La.C.Cr.P. art. 905.4 (c).

Issue Number 2

Whether the Louisiana Supreme Court review of the proportionality of death sentences is deficient in that it does not compare death sentences handed down across the state.

In reviewing the proportionality of the sentence imposed in a capital case the Louisiana Supreme Court requires that the district attorney file a list of all first degree murder cases heard after January 1, 1976 in the district in which the subject sentence was imposed. The list must include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant. La.Sup.Ct. Rule 28 §4; Louisiana Code of Criminal Procedure Article 905.9.

In the Capital Sentence Review conducted in the instant case, the Louisiana Supreme Court reviewed the sentences imposed in eighty-one first degree murder cases tried in Orleans Parish since January 1, 1976.*/ The Court determined that nine cases had resulted in the imposition of the death penalty, and that no sentence had been vacated bacause of disproportionality. State v. Jordan, 420 So.2d 420 (La.1982). The Court compared the instant case with those submitted in the review and determined that the imposition of the death penalty was not disproportionate nor the result of passion, prejudice or arbitrariness. State v. James, 431 So.2d 399, at 407 (La.1983).

Petitioner avers that the Louisiana Supreme Court's review of cases arising in the same judicial district as the subject case rather than a statewide review constitutes a superficial review and violates his procedural due process rights. Respondent maintains that although the U. S. Supreme Court has referred to statewide reviews as commendable, it has never implied that such review is a constitutional requirement. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, 428 U.S.242, 96 S.Ct. 2960, 49 L.Ed.2d 931 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Williams v. Maggio, 69 F.2d 381 (1982). Respondent further maintains that the sentencing review afforded to petitioner provided adequate safeguards against any arbitrary imposition of capital punishment. As the Fifth Circuit pointed out

---

*/ It should be noted that the City of New Orleans is geographically synonymous with Orleans Parish and constitutes the largest urban population area in the State. Orleans Parish is the only political subdivision in Louisiana to have a separate criminal and civil court system.

in Williams v. Maggio, supra:

> "Just as a venire chosen from a cross-section of the community in which the crime is committed is an adequate constitutional safeguard against arbitrary imposition of verdicts and sentences, so a review of the murder convictions imposed within that venire community is sufficient to ensure against arbitrary imposition of the death penalty."

CONCLUSION

For the foregoing reasons respondent avers that the petitioner's claims of error are without merit and therefore prays that certiorari be denied.

Respectfully submitted,

WILLIAM R. CAMPBELL, JR.
Assistant District Attorney
619 South White Street
New Orleans, Louisiana 70119
Tele: 822-2414, Ext. 259

CERTIFICATE

I certify that a copy of this Brief has been sent to:

Dwight Doskey, Esq.
Orleans Indigent Defender Program
Rm. 112 Criminal Courts Building
2700 Tulane Avenue
new Orleans, Louisiana 70119

Attorney for Petitioner